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**FORTIFYING THE RIGHTS OF UNAUTHORIZED
IMMIGRANT WORKERS: WHY EMPLOYEE
INCENTIVES UNDER THE NLRA WOULD HELP END
THE CYCLE OF LABOR RIGHTS ABUSE**

*Caitlin E. Delaney**

Over the past several decades, there has been an unmistakable tension between labor law and immigration law in the United States. That tension, addressed by the Supreme Court most recently in 2001, still exists for unauthorized immigrant workers who wish to assert their labor rights under the National Labor Relations Act (NLRA). While the Obama Administration has made significant strides in easing the concerns that unauthorized immigrant workers may have before filing an NLRA claim, the unavailability of the back pay remedy and the uncertainty of protection from immigration authorities leave little incentive for such workers to assert their labor rights. The federal government has every reason to incentivize workers to stand up against employers violating the NLRA, regardless of their immigration status, because it ensures a fair and safe workplace for all. This Note advocates for the federal government to (1) allow unauthorized immigrants to recover back pay under the NLRA, and (2) create a deferred action application process for those unauthorized immigrants who bring claims under the NLRA. Such action would deter employers from violating employees' rights, uphold the humanitarian values behind both labor and immigration policy, and reward unauthorized immigrants who unselfishly assert claims for the benefit of other workers.

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INTRODUCTION

On November 15, 2012, Griselda Barrera went to work at the same job that she had held for the previous eight years.¹ She was employed by a staffing agency in Illinois called Staffing Network Holdings, LLC, which provides “pickers” and “stockers” for a company called ReaderLink.² Ms. Barrera was a “picker,” which entailed standing and placing books into boxes and sending them down a production line alongside other employees performing the same task.³ Ms. Barrera consistently met her employer’s physically demanding standards and her work record was clean of any disciplinary complaints for insubordination or work performance issues.⁴ On November 15th, however, she witnessed her hesitant coworker, Juan, speak out after his supervisor demanded that he work at a quicker pace.⁵ After refusing to work faster at the rate he was being paid, Juan was sent home and subsequently terminated from his position due to his “attitude.”⁶ Ms. Barrera and other pickers tried to defend Juan against their supervisor, explaining that he could not keep up with the pace of the pickers because he was new.⁷ Their supervisor ordered them to return to work and warned that he could dismiss them for their “attitude[s]” as well.⁸ Later, the same supervisor threatened to dismiss Ms. Barrera individually.⁹ When Ms. Barrera asserted that “she could send a letter to the Department of Human Rights,” he responded by sending her home.¹⁰ Ms. Barrera refused, stating that “she had done nothing wrong.”¹¹ Her supervisor then ordered another

¹ Staffing Network Holdings, LLC, 13-CA-105031 (N.L.R.B. July 17, 2014), 2014 WL 3548163, *modified*, 362 N.L.R.B. No. 12 (Feb. 4, 2015), 2015 WL 471428.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

supervising employee to send Ms. Barrera home for the day.¹² The company later advised Ms. Barrera not to return to work and subsequently terminated her.¹³

Ms. Barrera filed a complaint with the National Labor Relations Board (“NLRB” or the “Board”), which determined that her employer had violated the National Labor Relations Act (“NLRA”) by terminating Ms. Barrera in retaliation for her “engaging in protected concerted activity.”¹⁴ At the time of adjudication, Ms. Barrera’s employer raised the affirmative defense that she was an unauthorized immigrant who was not entitled to certain remedies under the NLRA.¹⁵ The administrative law judge, however, asserted that the employer could not raise such a defense until the compliance stage of the proceeding.¹⁶

Ms. Barrera’s story is important for two reasons. First, it perfectly exemplifies the kind of employee conduct that the NLRA was designed to protect.¹⁷ Ms. Barrera not only stood up for her own labor rights, but also stood in solidarity with her fellow workers. Second, it highlights the uncertainty of bringing a case before the NLRB that questions an individual’s immigration status. This uncertainty has persisted in the United States for over a decade since the Supreme Court ruled in *Hoffman Plastic Compounds v. NLRB* that unauthorized immigrants are not entitled to back pay under the NLRA.¹⁸ This decision, though consistently

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151–169 (2012) (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining”); see also *Resources: National Labor Relations Act*, NLRB, <http://www.nlr.gov/resources/national-labor-relations-act> (last visited Oct. 5, 2015) (noting that the NLRA was enacted “to protect the rights of employees and employers” and “to encourage collective bargaining”).

¹⁸ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002).

criticized as impractical, illogical, and inhumane,¹⁹ continues to dictate the remedies available to unauthorized immigrants who choose to assert their labor rights under the NLRA.²⁰

In the ten years since *Hoffman Plastic Compounds*,²¹ the government has failed to implement a rule that harmonizes the goals of the Immigration Reform Control Act (“IRCA”) and the NLRA without denying unauthorized immigrants their basic labor rights. The Second Circuit’s decision in *Palma v. NLRB*,²² subsequent federal district court decisions,²³ and the 2013 Senate’s proposed immigration reform initiative²⁴ demonstrate the inconsistency of remedial options available to unauthorized immigrants and the continued need for reform. Incentivizing unauthorized immigrants to bring meritorious complaints to the NLRB is necessary to (1) deter employer-violators from violating federal labor laws, (2) provide all workers full protection from human rights abuse, and (3) reward unauthorized workers for their citizen-like qualities and demonstrated commitment to fairness and justice for all in the American labor force. In order to achieve an employee-incentive based solution, the legislative and executive branches should act in concert to reinstate back pay as an available remedy to all workers regardless of immigration status and to

¹⁹ See, e.g., Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 739 (2003) (“In deciding *Hoffman*, the Court had an opportunity to reconcile immigration and labor law in a way that would benefit all workers, but it instead highlighted the ineffectiveness of immigration law, and labor law’s inability to protect all workers.”).

²⁰ See, e.g., *Palma v. NLRB*, 723 F.3d 176, 187 (2d Cir. 2013).

²¹ See *Hoffman Plastic Compounds*, 535 U.S. at 137.

²² *Palma*, 723 F.3d at 187 (holding that undocumented aliens who were terminated in violation of the NLRA were not entitled to back pay).

²³ See, e.g., *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451, 453 (S.D.N.Y. 2013) (holding that undocumented workers are eligible to recover unpaid wages); *Akin v. Anjon of Greenlawn, Inc.*, 35 F. Supp. 3d 239, 242 (E.D.N.Y. 2014) (finding that undocumented aliens not being entitled to backpay “does not preclude [them] from seeking a claim for unpaid wages”).

²⁴ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong., § 3101(a) (2013) (proposing to amend “section 274A(a)(8)” of the Immigration and Nationality Act, 8 U.S.C. § 1324a, to include certain remedial options for undocumented workers).

create an affirmative deferred action process for unauthorized workers who come forward with complaints under the NLRA.

Part I of this Note provides background information as to the status of unauthorized immigrants today. Subpart A provides statistical information about unauthorized immigrants in the American workforce. Subparts B and C explain the history and relevant provisions of the two federal statutes that are at the heart of this issue—the National Labor Relations Act and the Immigration Reform and Control Act. Subpart D explores *Hoffman Plastic Compounds* and its progeny. Subpart E outlines the current administrative process for unauthorized immigrants, and Subpart F discusses the recent immigration reform efforts of the legislative and executive branches. Part II argues for an employee-incentive based solution in order to deter employers from violating the NLRA, to ensure equal protection of human rights to all workers, and to uphold the American values that drive the NLRA and current immigration policy. Part III proposes a two-pronged solution which focuses on congressional and executive action.

I. BACKGROUND

A. Unauthorized Immigrants in the U.S. Workforce

The United States houses approximately 11.4 million unauthorized immigrants.²⁵ An estimated 8.1 million of those immigrants are employed, representing approximately 5% of the U.S. labor force.²⁶ Unauthorized workers, along with other low-wage earning immigrants, most often work in industries known for unfair and illegal working conditions.²⁷ In New York City,

²⁵ BRYAN BAKER & NANCY RYTINA, OFFICE OF IMMIGRATION STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 2 (2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

²⁶ JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANT TOTALS RISE IN 7 STATES, FALL IN 14, at 16 (Nov. 18, 2014) http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf.

²⁷ DORIS MEISSNER, ET AL., MIGRATION POL'Y INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES 84 (Jan. 2013), <http://www.migration>

immigrants represent the largest group of workers in industries that are consistently unchecked by federal and state labor standards.²⁸ Although federal labor laws purport to protect unauthorized immigrants from substandard working conditions,²⁹ several obstacles stand in the way of meaningful legal protection.

The most obvious obstacle is the fear of interference from immigration authorities.³⁰ Unauthorized immigrants often do not assert their labor rights for fear of deportation of their friends, family, or themselves.³¹ Some critics believe that immigration authorities *should* interfere, and that unauthorized immigrants should not be afforded the same labor rights as U.S. citizens or authorized immigrants³² because legal protection may further incentivize illegal entry into the United States for unauthorized work.³³ This position often includes the misinformed argument that unauthorized immigrants steal jobs from American citizens.³⁴ Many lawmakers have recognized, however, that employment and

policy.org/research/immigration-enforcement-united-states-rise-formidable-machinery.

²⁸ See ANNETTE BERNHARDT ET AL., BRENNAN CTR. FOR JUST., UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 23 (2007), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_49436.pdf. In New York, these “unregulated” industries include groceries, retail, restaurants, building maintenance, and security, inter alia. See *id.* at 20–21.

²⁹ See, e.g., National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151–169 (2012); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

³⁰ See Daniel Ford et al., *Protecting the Employment Rights and Remedies of Washington’s Immigrant Workers*, 48 GONZ. L. REV. 539, 542–43 (2013).

³¹ *Id.* at 542.

³² For the purpose of this Note, “authorized immigrants” refers to foreigners working with valid employment authorization from the U.S. government.

³³ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 (2002) (explaining that awarding backpay to unauthorized immigrants “condones and encourages future violations” of immigration laws).

³⁴ See Alvaro Vargas Llosa, *Addressing and Discrediting 7 Major Myths About Immigration*, FORBES (May 29, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/05/29/addressing-and-discrediting-7-major-myths-about-immigration/>.

economic opportunities, rather than labor right protections, serve as the “magnets” that draw people to the United States.³⁵

*B. The National Labor Relations Act*³⁶

In 1935, Congress established the NLRA under the Wagner Act,³⁷ aiming to “protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices.”³⁸ The text of the NLRA has not undergone any substantial changes since 1935, except for the minor amendments established by the Taft-Hartley Act of 1947³⁹ and the Landrum-Griffin Act of 1959.⁴⁰ Section 7 of the Act outlines the rights of workers to self-organize, to form or join a union, to collectively bargain over the terms of their employment through representatives of their choosing, and to engage in other concerted activities for the purposes of collective bargaining or mutual protection.⁴¹ Violations of the NLRA may manifest when an employer retaliates against an employee who has complained about unfair labor practices, advocated for better working conditions, or attempted to form or join a union.⁴² Such retaliation often takes the form of termination, threats of termination, pay cuts, and threats to call immigration enforcement agencies.⁴³

³⁵ See H.R. REP. NO. 99-682, pt. 1, at 46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649.

³⁶ National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151–169 (2012).

³⁷ *The 1935 Passage of the Wagner Act*, NLRB, <https://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act> (last visited Oct. 5, 2015).

³⁸ *Resources: National Labor Relations Act*, *supra* note 17.

³⁹ Labor-Management Relations (Taft-Hartley) Act of 1947, Pub. L. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

⁴⁰ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

⁴¹ 29 U.S.C. § 157 (2012).

⁴² BERNHARDT, *supra* note 28, at 11.

⁴³ *Id.*

The NLRA established the NLRB, a quasi-judicial body, to enforce its provisions.⁴⁴ The NLRB is comprised of five members that the President appoints and the Senate confirms.⁴⁵ The members serve five-year terms, with one member's term expiring every year.⁴⁶ Currently, three Democrats, including the presidentially designated Chairman, and two Republicans, serve on the NLRB.⁴⁷ In addition to serving as the final decisionmaker in unfair labor practice disputes brought under the NLRA, the Board delegates its powers to Regional Directors⁴⁸ and its Division of Judges, or administrative law judges ("ALJs"),⁴⁹ who play an integral role throughout NLRA proceedings. Similar to traditional trial judges, ALJs preside over hearings and release opinions on the merits of complaints issued by Regional Directors.⁵⁰ If a complainant is unsatisfied with an ALJ's decision, he or she may appeal to the NLRB, which serves as "a specialized court of appeal."⁵¹

Section 10(c) of the NLRA authorizes the Board to order employers who engage in unfair labor practices to cease and desist from such practices and to take affirmative action to reinstate employees with or without back pay.⁵² Back pay under the NLRA

⁴⁴ *The Board*, NLRB, <http://www.nlr.gov/who-we-are/board> (last visited Oct. 5, 2015).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Members of the NLRB Since 1935*, NLRB, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Oct. 5, 2015).

⁴⁸ The NLRB has 26 "regions" throughout the United States, each headed by a Regional Director. *Regional Offices*, NLRB, <http://www.nlr.gov/who-we-are/regional-offices> (last visited Oct. 5, 2015). When filing a complaint that alleges unfair labor practices against an employer, the Regional Director is the authority that decides whether or not formal action should be taken. *The NLRB Process*, NLRB, <http://www.nlr.gov/resources/nlr-process> (last visited Oct. 5, 2015).

⁴⁹ See PATRICK CIHON & JAMES CASTAGNERA, EMPLOYMENT AND LABOR LAW 365 (8th ed. 2014). The appointment and tenure of ALJs are regulated by 5 U.S.C. § 3105. 5 U.S.C. § 3105 (2012).

⁵⁰ CIHON & CASTAGNERA, *supra* note 49.

⁵¹ *Id.*

⁵² 29 U.S.C. § 160(c) (2012). For the purpose of this Note, the phrase "back pay" refers to post-termination back pay in the NLRA context. The phrase

refers to post-termination back pay, and its purpose is to make employees whole for any loss in pay that resulted from the employer's unlawful conduct.⁵³ According to the Supreme Court, section 10(a) grants the NLRB broad discretion to choose an appropriate remedy with limited judicial interference.⁵⁴ The NLRA allows the NLRB to devise a remedy that will best "effectuate the policies of the Act," with limited judicial review.⁵⁵ Despite such apparent authority, however, the NLRB's broad discretion is actually quite limited.

Comparing the NLRB's authority and available remedies to the Fair Labor Standards Act ("FLSA"),⁵⁶ another federal statute that regulates employers and the rights of employees, reveals some of the NLRA's limitations. Although the FLSA principally governs employee wages and hours, it also forces certain employers to adhere to a national set of labor standards in order to protect employees' rights.⁵⁷ Specifically, the FLSA ensures that employees work and receive compensation in accordance with the wage and hour standards outlined in the statute.⁵⁸ The FLSA mandates remedies through a statutory formula from which the

"retroactive back pay" refers to another type of back pay, such as that covered under the FLSA.

⁵³ Robert S. Fuchs & Henry M. Kelleher, *The Back-Pay Remedy of the National Labor Relations Board*, 9 B.C. INDUS. & COM. L. REV. 829, 830 (1968).

⁵⁴ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984); *see also* *Phelps Dodge v. NLRB*, 313 U.S. 177, 194 (1941) ("Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.").

⁵⁵ 29 U.S.C. § 160(c).

⁵⁶ Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201–219 (2012).

⁵⁷ 29 U.S.C. § 202(a) (noting that industries in the United States have "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and declaring it the policy of the FLSA to "correct and as rapidly as practicable to eliminate [those] conditions").

⁵⁸ *See* 29 U.S.C. § 206(a) (setting out the minimum wage rates that employers must pay); 29 U.S.C. § 207(a) (requiring an employer to pay overtime compensation to an employee working over forty hours per week).

adjudicator cannot depart.⁵⁹ When an employee brings a meritorious claim, the FLSA holds employers liable “to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages.”⁶⁰ The NLRA, comparatively, does not allow for liquidated damages, which serve the same deterring purpose of punitive damages, and instead restricts the Board to issuing cease and desist orders and orders of reinstatement and back pay.⁶¹

After seventy years, the rights that the NLRA was designed to protect have been universally recognized as essential human rights.⁶² Despite a clear recognition of the importance of these rights, the NLRA’s ability to protect vulnerable populations, such as unauthorized immigrant workers, has diminished.⁶³ One possible reason for this failure is the stagnant nature of the law in a world that has substantially outgrown its parameters.⁶⁴ While the Act’s language has “remained virtually untouched” for generations, the United States has changed dramatically.⁶⁵ A more diversified labor force, new models of workplace organization, and the emergence of laws focusing on employment terms and

⁵⁹ 29 U.S.C. § 216(b).

⁶⁰ *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307 (11th Cir. 2013) (citing 29 U.S.C. § 216(b)).

⁶¹ 29 U.S.C. § 160(c).

⁶² Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1528 (2002) (“The right of employees to associate, communicate about shared concerns, form organizations for mutual aid, and peacefully seek shared objectives has achieved the status of an international human right.”); *see also, e.g.*, Richard Kahlenberg & Moshe Z. Marvit, *What Would MLK Do: How to Make Labor Organizing a Civil Right*, SLATE (Apr. 3, 2012, 4:30 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/on_the_anniversary_martin_luther_king_jr_s_death_a_call_to_make_joining_a_union_a_civil_right.html.

⁶³ *See* BERNHARDT, *supra* note 28, at 11 (listing frequent violations of labor laws, including discrimination based on immigration status and retaliation by threatening to call immigration); Estlund, *supra* note 62, at 1603–06 (discussing an example of NLRA’s ineffectiveness in enforcing some of its provisions and general workplace rights).

⁶⁴ Estlund, *supra* note 62, at 1535–37.

⁶⁵ *Id.* at 1535–36.

individual rights differentiate the working conditions in America today from the conditions that existed when Congress last amended the NLRA in 1959.⁶⁶

C. Section 1324a of the Immigration Reform and Control Act of 1986

The other body of law that is necessarily involved in NLRA claims brought by unauthorized immigrants is the Immigration Reform and Control Act of 1986 (“IRCA”).⁶⁷ Section 1324a of the IRCA sanctions and criminalizes the hiring of unauthorized immigrants.⁶⁸ This section specifically targets any employer who knowingly hires an unauthorized immigrant or, alternatively, hires a person without complying with statutory employment verification requirements.⁶⁹ The employment verification provision requires an employer to review an applicant’s documentation and “attest, under penalty of perjury” that such documentation indicates the applicant’s identity and authorization to work in the United States.⁷⁰ The statute also requires the applicant to attest to the truthfulness and accuracy of the required documents, making it unlawful for him or her to present fraudulent papers to obtain employment.⁷¹ However, the statute does not make it unlawful for unauthorized immigrants to search for employment.⁷²

The main objective of this section of the IRCA is to reduce the number of unauthorized immigrants settling in the United States by decreasing access to employment opportunities.⁷³ This is based on

⁶⁶ *Id.*

⁶⁷ Immigration Reform and Control Act of 1986, 99 Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁶⁸ 8 U.S.C. § 1324a (2012).

⁶⁹ *Id.*

⁷⁰ *Id.* For a more detailed overview of the inspection process used to enforce the employment verification provision, see *Form I-9 Inspection Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (June 26, 2013), <https://www.ice.gov/factsheets/i9-inspection>.

⁷¹ 8 U.S.C. § 1324a(b)(2).

⁷² 8 U.S.C. § 1324a.

⁷³ H.R. REP. NO. 99-682, pt. 1, at 45–46 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649.

the long-held proposition that unauthorized immigrants are drawn to the United States for employment purposes.⁷⁴ By imposing sanctions upon employers who fail to verify that an employee is legally authorized to work, Congress aimed to deter employers from hiring unauthorized immigrants and thereby decrease the incentive for unauthorized immigrants to come to the United States in search of work.⁷⁵ However, rather than deterring employers from hiring unauthorized immigrants, some argue that the provisions incentivize employers to implement undesirable strategies to curtail the sanctions imposed by the statute.⁷⁶

D. The Hoffman Plastic Compounds Dilemma and its Progeny

Prior to its controversial decision in *Hoffman Plastic Compounds v. NLRB*,⁷⁷ the Supreme Court had already established that unauthorized immigrants were “employees” protected by the NLRA, as that designation was consistent with the Act’s “purpose of encouraging and protecting the collective bargaining process.”⁷⁸ The Court had not identified, however, the remedies available to unauthorized immigrants without interfering with the IRCA’s objectives of discouraging illegal immigration through employment-related sanctions.⁷⁹ In *Hoffman Plastic Compounds*,

⁷⁴ *Id.* at 46 (“Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status.”). While it is clear that employment opportunities create a strong incentive for people to immigrate to the United States, it is also important to recognize that other motivating factors exist, such as family reunification and life-threatening country conditions. *See, e.g., Why Are So Many Children Trying to Cross the US Border?*, BBC NEWS (Sept. 30, 2014), <http://www.bbc.com/news/world-us-canada-28203923> (attributing the recent surge of unaccompanied alien children to a spike of gang and drug related violence).

⁷⁵ *See* H.R. REP. NO. 99-682.

⁷⁶ *See* BERNHARDT, *supra* note 28, at 35 (“IRCA created incentives for employers to use cash payment, subcontractors, employee status misclassification and other strategies in order to escape liability for hiring undocumented workers.”).

⁷⁷ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

⁷⁸ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

⁷⁹ *See* H.R. REP. NO. 99-682.

the Court addressed this uncertainty in considering whether the NLRB could award post-termination back pay to an immigrant who had never been legally permitted to work in the United States.⁸⁰ The case arose when several employees of Hoffman Plastic Compounds, Inc. (“Hoffman”) engaged in union organizing activities and were subsequently terminated.⁸¹ The NLRB found that Hoffman had unlawfully discharged four of its employees, including Jose Castro, in retaliation for their protected activities.⁸² The Board ordered that Hoffman offer reinstatement and back pay to the four affected employees.⁸³

During the compliance proceedings, the Board found that Castro had submitted fraudulent documents to Hoffman, which superficially appeared to verify his employment authorization.⁸⁴ However, Castro had never received legal admission or work authorization in the United States.⁸⁵ The Board reversed the Administrative Law Judge’s (“ALJ”) decision that the IRCA precluded the issuing of back pay to Castro, and, after several appeals, the Supreme Court ultimately granted certiorari to resolve the issue.⁸⁶ The Supreme Court concluded that the Board could not award back pay to Castro on the ground that such an order would “unduly trench upon explicit statutory prohibitions critical to federal immigration policy.”⁸⁷ The Court, effectively prioritizing the goals of federal immigration policy over those of federal labor policy, explained that the IRCA made it impossible for unauthorized immigrants to gain lawful employment without either the employer or the employee violating federal law.⁸⁸

In limiting the Board’s remedial discretion, the Court attempted to downplay the colossal impact of barring back pay as a remedy by stating that there were other remedies available to the Board that would just as effectively fulfill the purposes of the

⁸⁰ *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 143.

⁸¹ *Id.* at 140.

⁸² *Id.*

⁸³ *Id.* at 140–41.

⁸⁴ *Id.* at 141.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 151.

⁸⁸ *Id.* at 148.

NLRA.⁸⁹ These remedial alternatives, famously denounced by Justice Breyer in his dissenting opinion,⁹⁰ included the orders for Hoffman to cease and desist its unfair labor practices and to post a notice to employees explaining their rights under the NLRA and how Hoffman had previously violated them.⁹¹ The Court explained that these remedies, coupled with the threat of contempt proceedings if Hoffman failed to comply, were sufficiently effective in promoting the policies of the NLRA.⁹² Perhaps anticipating the ramifications of its decision, the Court called on Congress to address any “perceived deficiency in the NLRA’s existing remedial arsenal” rather than leaving it to the courts to resolve.⁹³

Justice Breyer, joined by Justices Stevens, Ginsberg, and Souter, emphatically rejected the Court’s conclusion and argued that the Board’s ability to award back pay was critical to compensating victims and, more importantly, deterring employers from engaging in unlawful labor practices.⁹⁴ By removing back pay from its “remedial arsenal,” the Court restricted the Board to ordering remedies that would impose only “future-oriented obligations” upon employers engaged in illegal labor practices.⁹⁵

In 2013, the Second Circuit extended the application of the *Hoffman Plastic Compounds* rule to a larger class of employees in *Palma v. NLRB*, where the court clarified that *any* unauthorized immigrant, regardless of whether he or she had obtained employment through fraud or misrepresentation, could not recover back pay under the NLRA.⁹⁶ The court rejected the ALJ’s conclusion that the *Hoffman Plastic Compounds* decision turned upon the fact that the employee in that case, as an unauthorized immigrant, had violated the IRCA by presenting fraudulent documents to an unknowing employer in order to obtain

⁸⁹ *See id.* at 152.

⁹⁰ *Id.* at 153 (Breyer, J., dissenting).

⁹¹ *Id.* at 152 (majority opinion).

⁹² *Id.*

⁹³ *Id.* (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984)).

⁹⁴ *Id.* at 153–54 (Breyer, J., dissenting).

⁹⁵ *Id.* at 154.

⁹⁶ *Palma v. NLRB*, 723 F.3d 176, 184 (2d Cir. 2013).

employment.⁹⁷ In *Palma*, the Second Circuit found that the employer had violated the IRCA by knowingly hiring an unauthorized immigrant, and there was no employee fraud involved.⁹⁸ However, the court agreed with the Board that regardless of whether it is the employer or employee who violates the IRCA, “the result is an unlawful employment relationship.”⁹⁹ The court noted that Congress’s decision not to explicitly sanction or criminalize unauthorized immigrants for merely working without legal status does not mean that Congress intended to “allow the Board to *encourage* undocumented workers by awarding them backpay.”¹⁰⁰ The court reiterated *Hoffman Plastic Compounds*’ reasoning in stating that it would cut against Congressional immigration policy to award back pay to an employee who was never legally entitled to work.¹⁰¹ The court further relied on *Hoffman Plastic Compounds* in concluding that, because the back pay award sought by petitioners stemmed from such an unlawful employment relationship, allowing for such damages could potentially excuse prior violations and encourage future violations of the IRCA.¹⁰²

The “categorical bar”¹⁰³ imposed by *Palma* against awarding back pay to unauthorized immigrants has yet to be challenged in the courts, but has been repeatedly confined to the NLRA context.¹⁰⁴ Several district courts have declined to extend *Palma*’s rule to plaintiffs seeking damages under the FLSA.¹⁰⁵ In *Colon v. Major Perry Street Corp.*, for example, the Southern District of

⁹⁷ *Id.* at 179.

⁹⁸ *Id.*

⁹⁹ *Id.* at 180–81.

¹⁰⁰ *Id.* at 184 (emphasis added).

¹⁰¹ *Id.* at 185.

¹⁰² *Id.* at 184.

¹⁰³ *Second Circuit Holds Undocumented Workers Are Categorically Barred From Backpay Under the National Labor Relations Act*, 127 HARV. L. REV. 1236, 1236 (2014).

¹⁰⁴ See, e.g., *Akin v. Anjon of Greenlawn, Inc.*, 35 F. Supp. 3d 239 (E.D.N.Y. 2014); *Colon v. Major Perry St. Corp.*, 987 F. Supp. 2d 451 (S.D.N.Y. 2013).

¹⁰⁵ See *Akin*, 35 F. Supp. 3d at 240–41 (listing cases); *Colon*, 987 F. Supp. 2d at 456–57 (listing cases).

New York outlined the historical, statutory, and policy differences between the two statutes to avoid imposing *Palma's* categorical bar in the FLSA context.¹⁰⁶ The court provided an overview of the cases preceding the present interpretation of the NLRA and concluded that *Palma* had not changed the well-settled consensus that unauthorized immigrants are still entitled to back pay under the FLSA.¹⁰⁷ The court then distinguished the remedies available under the FLSA from those available under the NLRA.¹⁰⁸ The court articulated that the NLRB had particularly broad discretion in devising an appropriate remedy for violators of the Act, while the FLSA limited courts to statutorily mandated damages that were not affected by “shifting immigration polic[ies].”¹⁰⁹ Additionally, the court reasoned that, in accordance with *Hoffman Plastic Compounds*, the NLRA provides “many alternative remedies” to supplement or replace back pay, while the FLSA has few alternative remedies and relies on retroactive back pay as its primary form of relief for effectuating the law’s policies.¹¹⁰ The *Colon* court further concluded that the NLRA and FLSA regulate plainly different activities.¹¹¹ While the NLRA regulates labor organization by compelling employers to compensate workers whom they have punished for exercising their labor rights, the FLSA compels employers to pay their employees for work performed.¹¹²

The Southern District further concluded that the remedy of back pay available under the NLRA was not synonymous with the retroactive back pay available under the FLSA.¹¹³ Citing other district courts’ interpretations of the *Hoffman Plastic Compounds* holding, the court noted that it did not preclude awarding retroactive back pay to employees for *work performed*.¹¹⁴ Unlike awarding post-termination back pay, an order compelling an

¹⁰⁶ *Colon*, 987 F. Supp. 2d at 451, 454–64.

¹⁰⁷ *Id.* at 456–58.

¹⁰⁸ *Id.* at 458–59.

¹⁰⁹ *Id.* at 458.

¹¹⁰ *Id.* at 459.

¹¹¹ *Id.*

¹¹² *Id.* at 459–60.

¹¹³ *Id.* at 460–61.

¹¹⁴ *Id.* at 461–62.

employer to pay an unauthorized immigrant for work performed does not condone or continue the immigration violation, and instead ensures that the employer does not “avail[] himself of the benefit of undocumented workers’ past labor without paying for it.”¹¹⁵ However, post-termination back pay sought under the NLRA was only recoverable for employees who were deemed “available for work” after their wrongful termination, a qualification that the Supreme Court had previously established was inapplicable to unauthorized immigrants.¹¹⁶

Finally, the court explained that a “cost-benefit analysis” of employers’ incentives in an underenforced regime would reveal that providing back pay to unauthorized immigrants under the FLSA was more aligned with the policies of the IRCA than providing back pay under the NLRA.¹¹⁷ The court deemed the cost of removing back pay as a remedy under the FLSA higher than the cost for removing back pay under the NLRA because the only other deterring remedy available under the FLSA was a \$1,100 fine for “repeat or willful violat[ors]” of the law.¹¹⁸ The court also found that the benefit of an employer underpaying its unauthorized employees and receiving an immediate accrual of cheap labor was very great, and thus a strong incentive for employers to violate the IRCA if the FLSA back pay remedy was not a consequence.¹¹⁹ On the other hand, it was far more “attenuated” that an employer would seek to hire an unauthorized immigrant based on the fact that post-termination back pay was not available as a remedy under the NLRA.¹²⁰ The court here did not assert that back pay under the NLRA was not beneficial to promoting national immigration policy, but simply provided that the FLSA provided a greater benefit to the promotion of such policies.¹²¹

¹¹⁵ *Id.* at 461 (quoting *Madeira v. Affordable Hous. Found.*, 469 F.3d 219, 243 (2d Cir. 2006)).

¹¹⁶ *Id.* (quoting *Sure-Tan v. NLRB*, 467 U.S. 883, 889 (1984)).

¹¹⁷ *Id.* at 462–63.

¹¹⁸ *Id.* (citing 29 U.S.C. § 216(e)(2) (2012)).

¹¹⁹ *Id.* at 463.

¹²⁰ *Id.*

¹²¹ *Id.*

*E. The Labor Rights of an Unauthorized Immigrant Today
and the Administrative Process under the NLRA*

Despite the post-*Hoffman Plastic Compounds* criticism¹²² and the lower courts' refusal to extend the *Hoffman Plastic Compounds* rule to cases arising under the FLSA or state labor laws,¹²³ few cases brought beyond the context of NLRB administrative proceedings have challenged the legitimacy of the *Hoffman Plastic Compounds* holding.

Griselda Barrera exemplifies the challenges presented by the *Hoffman Plastic Compounds* ruling. Her story demonstrates how *Hoffman Plastic Compounds* and the lack of comprehensive reform creates a real problem for a particularly vulnerable population.¹²⁴ Ms. Barrera followed the proper NLRA procedure and filed the initial charge with the NLRB's General Counsel, who issued a complaint about five months later.¹²⁵ The complaint alleged that Ms. Barrera's employer had violated section 8(a)(1) of the NLRA by "threatening to terminate employees" and actually terminating Ms. Barrera for "engag[ing] in protected concerted activity."¹²⁶

¹²² See, e.g., Gabriela Robin, *Hoffman Plastic Compounds Inc. v. National Labor Relations Board: A Step Backwards for All Workers in the United States*, 9 NEW ENG. J. INT'L & COMP. L. 679 (2003).

¹²³ See, e.g., *Colon*, 987 F. Supp. 2d at 456–57 (listing cases); *Salas v. Sierra Chemical Co.*, 327 P.3d 797, 804–05 (Cal. 2014) (listing cases).

¹²⁴ Unauthorized immigrant workers are more vulnerable than native U.S. workers, as they are more likely to be denied regular or overtime pay and more likely to be injured or killed on the job. EUNICE HYUNHYE CHO & REBECCA SMITH, *WORKERS RIGHTS ON ICE 2* (2013), <http://www.nelp.org/content/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report-California.pdf>. The statistics that support these facts probably underestimate the true number of exploited unauthorized immigrant workers because of the low reporting rates by workers who fear retaliation from their employers. *Id.*; see also Paul Harris, *Undocumented Workers' Grim Reality: Speak Out On Abuse and Risk Deportation*, GUARDIAN (Mar. 28, 2013), <http://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation> (reporting the stories of undocumented workers who spoke out against employer abuses and faced deportation).

¹²⁵ *Staffing Network Holdings, LLC*, 13-CA-105031, 2014 WL 3548163 (N.L.R.B. July 17, 2014), 2014 WL 3548163, *modified*, 362 N.L.R.B. No. 12 (Feb. 4, 2015), 2015 WL 471428.

¹²⁶ *Id.*

The Board held an evidentiary hearing and decided that the claims alleged in the complaint were indeed meritorious.¹²⁷ It found that Ms. Barrera's employer had unlawfully threatened to terminate its employees at two separate times, and that it had unlawfully terminated Ms. Barrera.¹²⁸ One of the defenses that Ms. Barrera's employer attempted to raise was that Ms. Barrera was not a legally authorized immigrant and therefore could not receive awards of reinstatement or back pay.¹²⁹ In accordance with the policies set forth by the NLRB after *Hoffman Plastic Compounds*,¹³⁰ the Board explained that it could not consider such a defense until the compliance proceedings.¹³¹ The Board officially ordered that Ms. Barrera's employer offer her full reinstatement and back pay, among the other traditional remedies.¹³²

Despite the Board's decision in Ms. Barrera's favor, its order will not be effectuated until it reaches the compliance proceedings, at which the respondents will most likely raise the issue of Ms. Barrera's immigration status in an attempt to preclude the enforcement of the Board's ordered remedies.¹³³ Ms. Barrera's case has not yet reached compliance proceedings, but, based on the current state of the law and the remaining procedural steps in the

¹²⁷ See *id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Memorandum from Arthur F. Rosenfeld, Gen. Counsel, to All Reg'l Dirs., Officer-in-Charge and Resident Officers, Procedures and Remedies for Discriminatees Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.* (July 19, 2002), <http://apps.nlr.gov/link/document.aspx/09031d45800e2379>; see also Memorandum from Richard A. Siegel, Assoc. Gen. Counsel, to All Reg'l Dirs., Officers-in-Charge and Resident Officers, Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings 3 (June 7, 2011) [hereinafter OM 11-62], <http://apps.nlr.gov/link/document.aspx/09031d45818801f9> (“[I]mmigration status (or lack thereof) is generally not relevant either in representation proceedings or at the merits stage of unfair labor practice proceedings.”).

¹³¹ Staffing Network Holdings, LLC, 13-CA-105031, 2014 WL 3548163 (N.L.R.B. July 17, 2014), 2014 WL 3548163, *modified*, 362 N.L.R.B. No. 12 (Feb. 4, 2015), 2015 WL 471428.

¹³² *Id.*

¹³³ See NLRB, NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL PART THREE: COMPLIANCE PROCEEDINGS 10666.10 (Oct. 2015), <https://www.nlr.gov/reports-guidance/manuals>.

NLRB claim process, there are several assumptions that one can make about her case's outcome. In 2011, the NLRB's Office of the General Counsel issued a memorandum instructing officers on the protocol for handling immigration issues arising in the context of NLRB investigations and proceedings.¹³⁴ With these policies in mind, in conjunction with those set forth by the Department of Homeland Security ("DHS"),¹³⁵ Ms. Barrera's case may proceed as follows: if Ms. Barrera's employer challenges her eligibility to recover reinstatement and back pay during the compliance proceedings, it carries the burden of showing the "existence of a genuine issue" of immigration status.¹³⁶ Immigration related questioning is therefore relevant during the compliance proceedings to decide whether a genuine issue exists.¹³⁷ If Ms. Barrera can verify that she was indeed authorized to work in the United States, her award of back pay will likely stand. If, however, Ms. Barrera's employer is able to establish that her immigration status is a genuine issue, the Board has several options. First, it may simply order "conditional reinstatement," which would require the employer to rehire Ms. Barrera only on the condition that she present valid employment authorization.¹³⁸ This option would only be available to Ms. Barrera if she had not previously presented such authorization at her initial time of hiring.¹³⁹ Alternatively, the Board can attempt to defer immigration action or pursue the certification of visas.¹⁴⁰

The NLRB General Counsel has outlined several circumstances in which Regions should bring a matter to the

¹³⁴ OM 11-62, *supra* note 130.

¹³⁵ Memorandum from John Morton, Dir., U.S. Immigration and Customs Enforcement, to All Field Office Dirs., Special Agents in Charge, Chief Counsel, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

¹³⁶ OM 11-62, *supra* note 130, at 3.

¹³⁷ NAT'L EMP'T LAW PROJECT, RIGHTS AND REMEDIES FOR UNDOCUMENTED WORKERS IN ORGANIZING 2 (2011), http://nelp.3cdn.net/c09bf05d2e4f5caa3c_s8m6bhcn.pdf.

¹³⁸ *Id.* at 4.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

attention of the Division of Operations Management to consider whether to pursue one of the above alternative actions, such as deferred action or certification of visas: 1) where the status of an individual involved in the case is lost due to concerted activities that are protected; 2) where the individual's presence in the country is important in order for the Act's purpose to be enforced; 3) where NLRB or immigration processes are being abused by the employer; and/or 4) where the employer knew or was willfully ignorant of the employee's lack of status.¹⁴¹

These circumstances, though not exhaustive, illustrate situations in which the Board may decide to seek assistance from the U.S. Citizenship and Immigration Services ("USCIS"), Immigration and Customs Enforcement ("ICE"), or Customs and Border Patrol ("CBP").¹⁴² These agencies then may choose to exercise prosecutorial discretion, a rather broad executive power that permits any law enforcement agency to decide whether or not to proceed with enforcing the law against someone.¹⁴³ In the immigration context, this power encompasses "[f]ocusing enforcement resources on particular administrative violations or

¹⁴¹ OM 11-62, *supra* note 130, at 4–7.

¹⁴² *Id.* at 1–2. These three immigration agencies operate under the Department of Homeland Security ("DHS"), which replaced the Immigration and Naturalization Service ("INS") in 2002 when Congress passed the Homeland Security Act. Homeland Security Act, 6 U.S.C. §§ 101, 113, 202 (2012). The USCIS is the DHS's services unit, responsible for "oversee[ing] lawful immigration to the United States." *About*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/aboutus> (last updated Aug. 14, 2015). CBP and ICE are the enforcement branches of the Department; the former oversees border enforcement and control, while the latter oversees the criminal and civil enforcement of federal immigration law. *About CBP*, U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/about> (last visited Oct. 5, 2015); *History of ICE*, IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/history> (last visited Oct. 5, 2015).

¹⁴³ U.S. DEP'T OF JUSTICE, IMMIGRATION & NATIONALIZATION SERV., FACT SHEET: PROSECUTORIAL DISCRETION GUIDELINES 1 (2000), http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/c_6-27DOJ2000ProsDiscretionGuideOVW3-31-09.pdf.

conduct; . . . granting deferred action . . . or staying a final removal order,” and other discretionary enforcement decisions.¹⁴⁴

The administrative mechanism of deferred action,¹⁴⁵ in addition to the DHS’s policy of prioritizing parties for whom immigration enforcement is essential or nonessential,¹⁴⁶ indicate progress for unauthorized immigrants who wish to assert their rights under the NLRA. Because of the policies that these agencies set forth, an unauthorized immigrant can file a complaint with the NLRB without having to initially reveal her immigration status, and generally avoid the immigration issue until the compliance proceedings.¹⁴⁷ The immediate fear of ICE interference and the

¹⁴⁴ Memorandum from Doris Meissner, Comm’r, Immigration & Nationalization Serv., to Reg’l Dirs., District Dirs., Chief Patrol Agents, Reg’l and Dist. Counsel, Exercising Prosecutorial Discretion (Nov. 17, 2000) [hereinafter Meissner Memo], <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. Doris Meissner, former INS commissioner, issued this memo in 2000 to all personnel as a guide to using prosecutorial discretion, which is still used often by practitioners today. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L. J. 243, 254 (2010). Other powers in the immigration context of prosecutorial discretion include “deciding whom to stop, question, and arrest; maintaining an alien in custody; seeking expedited removal or other forms of removal by means other than a removal proceeding; settling or dismissing a removal proceeding; granting deferred action or staying a final order; agreeing to voluntary departure . . . and executing a removal order.” Meissner Memo, *supra*.

¹⁴⁵ Deferred action is the “use of prosecutorial discretion to not remove an individual from the country for a set period of time, unless the deferred action is terminated for some reason.” *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/immigrationaction#1> (last updated Apr. 15, 2015). “Deferred action . . . only establishes lawful presence but does not provide immigration status or benefits of any kind.” *Id.*

¹⁴⁶ See Meissner Memo, *supra* note 144 (explaining the use of prosecutorial discretion). There are two theories behind prosecutorial discretion in the immigration context: one is monetary, in that the agency saves money by focusing its limited resources on populations or individuals who are deemed more threatening to national interests and public safety. Wadhia, *supra* note 144, at 244. The second theory is humanitarian, which considers the “redeeming qualities” of those people who may have technically broken the law but may morally deserve to escape the full effect of enforcement. *Id.* at 244–45.

¹⁴⁷ OM 11-62, *supra* note 130, at 3.

threat of deportation should be minimal, even at the compliance stage, where employees may still avoid deportation.¹⁴⁸

F. Recent Immigration Reform

1. The Senate Bill

In May of 2013, the Senate passed a comprehensive immigration bill called the Border Security, Economic Opportunity, and Immigration Modernization Act, or S. 744.¹⁴⁹ Section 3101(a)(8)(A)(i) provides that employees cannot be denied the remedies of state and federal labor protection laws as a consequence of their immigration status.¹⁵⁰ The section still prohibits reinstatement as a remedy under the NLRA for an unauthorized worker, but allows for all other remedies.¹⁵¹ Specifically targeting the back pay issue, the bill provides:

[A]ll rights and remedies provided under Federal, State, or local law relating to workplace rights, including but not limited to back pay, are available to an employee despite (i) the employee's status as an unauthorized alien during or after the period of employment; or, (ii) the employer's or employee's failure to comply with the requirements of this section.¹⁵²

This provision goes so far as to extend back pay and the full arsenal of NLRA remedies even to unauthorized workers who have

¹⁴⁸ See Meissner Memo, *supra* note 144 (noting how individuals “subject to removal” can come to the attention of prosecutors “in a variety of ways” but reaffirming that even where there is sufficient evidence to do so, prosecutors may still exercise discretion and decline to proceed with the case).

¹⁴⁹ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013). The bill was written by a bipartisan coalition of Senators Charles Schumer, John McCain, Richard Durbin, Robert Menendez, Marco Rubio, Michael Bennett, and Jeff Flake. IMMIGRATION POLICY CTR., A GUIDE TO S.744: UNDERSTANDING THE 2013 IMMIGRATION BILL 3 (2013), http://www.immigrationpolicy.org/sites/default/files/docs/guide_to_s744_corker_hoeven_final_12-02-13.pdf.

¹⁵⁰ S. 744, § 3101(a)(8)(A)(i).

¹⁵¹ *Id.* § 3101(a)(8)(B)(i).

¹⁵² *Id.* §§ 3101(a)(8)(A)(i)–(ii).

obtained employment through fraudulent means, as was the case in *Hoffman Plastic Compounds*.

While S. 744 drew support from a variety of groups,¹⁵³ the House of Representatives has yet to put it to a vote.¹⁵⁴ Despite the further efforts of bipartisan Senators and House Democrats, there has been little movement in the area of immigration since the House's failed attempt to pass a counterpart to S. 744, HR 15.¹⁵⁵ House Republicans asserted that a "piecemeal" approach would be better than a large, comprehensive bill but have failed to act on that approach as well.¹⁵⁶

2. President Obama's 2014 Executive Action

On November 20, 2014, "President [Obama] announced a series of executive actions" that expanded the use of deferred action in immigration.¹⁵⁷ Deferred action, though not a means of permanent immigration relief, allows for an unauthorized

¹⁵³ See *America's Business Leaders Praise Senate's Passage of Immigration Bill*, BUS. ROUNDTABLE (June 27, 2013), <http://businessroundtable.org/media/news-releases/americas-business-leaders-praise-senate-passage-of-immigration-bill> (reporting the praise for S. 744 from CEOs in various sectors of the economy); *US Bishops Praise Immigration Bill's Advance in Senate*, CATH. NEWS AGENCY (May 23, 2013, 2:02 PM), <http://www.catholicnewsagency.com/news/us-bishops-praise-immigration-bills-advance-in-senate/> (citing support for S. 744 from Catholic bishops in the United States).

¹⁵⁴ See Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/> (discussing how S. 744 was passed but the "House of Representatives refused to consider it—or any other form of immigration reform—and S. 744 died a slow, painful death in the 113th Congress").

¹⁵⁵ See Mary Giovagnoli, *The Legacy of S. 744, the Senate Immigration Reform Bill*, IMMIGR. IMPACT (June 27, 2014), <http://immigrationimpact.com/2014/06/27/the-legacy-of-s-744-the-senate-immigration-reform-bill/>; Lawrence Downes, *Immigration Reform Is Dead*, N.Y. TIMES (June 25, 2014, 1:03 PM), http://takingnote.blogs.nytimes.com/2014/06/25/immigration-reform-is-dead/?_php=true&_type=blogs&_r=0 (providing a pessimistic view of the future of immigration reform).

¹⁵⁶ Downes, *supra* note 155.

¹⁵⁷ *Executive Actions on Immigration*, *supra* note 145.

immigrant to gain work authorization and is renewable every two years.¹⁵⁸ The Obama Administration expanded upon its 2012 program, Deferred Action for Childhood Arrivals (“DACA”), allowing people who came to the United States as children and met a particular set of guidelines to affirmatively apply for deferred action.¹⁵⁹ In expanding the program, President Obama increased the population of individuals eligible to apply to DACA by opening the program to applicants of any current age, rather than only those under thirty.¹⁶⁰ The administration also extended the time period for DACA and work authorization from two to three years before renewal is necessary.¹⁶¹

Highlighting the significance of having familial ties to a U.S. citizen or legal permanent resident,¹⁶² President Obama announced a new program in November 2014 that would begin accepting applications in six months for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”).¹⁶³ Similar to DACA, DAPA applicants would have to meet certain criteria to be eligible for the temporary relief.¹⁶⁴ Under DACA, the applicant

¹⁵⁸ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca#guidelines> (last visited Oct. 5, 2015).

¹⁵⁹ *Id.*

¹⁶⁰ *Executive Actions on Immigration*, *supra* note 145.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ U.S. CITIZENSHIP & IMMIGRATION SERVS., YOU MAY BE ABLE TO REQUEST DAPA. WANT TO LEARN MORE?, (2015) [hereinafter YOU MAY BE ABLE TO REQUEST DAPA], http://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf.

¹⁶⁴ *Id.* A person may be considered eligible for DAPA if he or she shows 1) continuous residence in the United States since January 1, 2010; 2) physical presence in the United States on the day that the executive action was announced and at the time the DAPA request is filed; 3) absence of lawful status on the day that the executive action was announced; 4) that he or she had “a [child] . . . of any age or marital status, who is a U.S. Citizen [] or Legal Permanent Resident” at the time of the executive action’s announcement; and 5) that he or she has no past felony convictions, serious misdemeanor convictions, or “three or more other misdemeanors;” that he or she does not pose a national security risk; and that he or she is “not an enforcement priority for removal.” *Id.*

must have arrived in the United States before the age of sixteen,¹⁶⁵ demonstrating his or her ties to U.S. education, culture, and society from a young age. Under DAPA, the applicant must have a child that is a U.S. citizen or legal permanent resident,¹⁶⁶ demonstrating a familial tie to the United States. Both programs have been met with challenges, including a court order issued by Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas, and have been at least temporarily stalled.¹⁶⁷ Despite the uncertainty of the programs' futures, DACA and DAPA exemplify the prioritization policies of the current administration and provide stepping stones for policy makers in Congress to make meaningful changes to immigration legislation.

II. THREE REASONS WHY AN EMPLOYEE-BASED SOLUTION IS NECESSARY

The NLRA and IRCA share a common purpose of employer-centered deterrence. The IRCA aims to deter employers from hiring unauthorized immigrants¹⁶⁸ and the NLRA seeks to deter employers from exploiting the labor rights of their employees.¹⁶⁹ The Obama Administration has emphasized these goals through its policies and has made impressive strides in penalizing employer-

¹⁶⁵ *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 158.

¹⁶⁶ YOU MAY BE ABLE TO REQUEST DAPA, *supra* note 163.

¹⁶⁷ *Federal Court Halts DAPA and Expanded DACA Programs*, CTR. FOR MIGRATION STUD. (Feb. 17, 2015), <http://cmsny.org/federal-court-halts-dapa-and-expanded-daca-programs/>. In May of 2015, the United States Court of Appeals for the Fifth Circuit denied President Obama's "request to lift a hold on the president's executive actions on immigration," upholding the injunction ordered by Judge Hanen of the U.S. District Court for the Southern District of Texas. Julia Preston, *Federal Panel Lets Injunction Against Obama's Immigration Actions Stand*, N.Y. TIMES (May 26, 2015), http://www.nytimes.com/2015/05/27/us/fifth-circuit-court-of-appeals-rules-on-obama-immigration-plan.html?_r=0.

¹⁶⁸ H.R. REP. NO. 99-682, pt. 1, at 45 (1986), as reprinted in 1986 U.S.C.A.N. 5649.

¹⁶⁹ *Resources: National Labor Relations Act*, *supra* note 17.

violators.¹⁷⁰ For example, under the Bush Administration, “ICE issued only eighteen final orders [against violating employers] in 2008, resulting in \$675,000 in fines.”¹⁷¹ Under the Obama Administration in 2013, however, ICE reported serving over three thousand notices of worksite inspections and over six hundred final orders, resulting in nearly \$16 million in fines.¹⁷² Despite such increases, the executive’s reach has not extended far enough to prevent employers from violating federal laws. Indeed, statistics still indicate that a large number of unauthorized immigrants are employed in the United States,¹⁷³ and are more often subject to unfair and unsafe working conditions imposed by their employers.¹⁷⁴ U.S. labor policy should therefore focus on *incentivizing* unauthorized employees to assert their labor rights under the NLRA for three reasons: 1) more unauthorized immigrant workers coming forward with NLRA claims would deter employers from violating both the NLRA and the IRCA; 2) full protection to all employees regardless of immigration status would be consistent with the rights promised to all employees under the NLRA and would comport with our nation’s basic understanding of human rights; and 3) an employee incentives model would reward those employees who act consistently with the labor values of the United States and present themselves as ideal candidates for citizenship.

¹⁷⁰ Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225, 228 (2013) (citing *Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 1, 2013), <https://www.ice.gov/factsheets/worksite>). There has also been a rise in the number of criminal convictions against employers for immigration related hiring decisions. *Worksite Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 1, 2013), <https://www.ice.gov/factsheets/worksite>.

¹⁷¹ Lee, *supra* note 170.

¹⁷² *Worksite Enforcement*, *supra* note 170. Among the other workplace enforcement accomplishments listed for 2013, ICE reported making 452 criminal arrests related to such investigations, debarring nearly three hundred businesses and individuals in response to their administrative or criminal violations, and conducting outreach presentations to nearly 15,000 employers. *Id.*

¹⁷³ See BERNHARDT, *supra* note 28, at 23.

¹⁷⁴ *Id.*

A. Employer Deterrence

In the years since *Hoffman Plastic Compounds*, various policy memorandums from the NLRB and the DHS have improved the landscape for unauthorized immigrants who choose to bring complaints to the NLRB without threat of immediate deportation.¹⁷⁵ In general, there has been a steady downward trend of employee-filed charges before the NLRB since fiscal year 2005.¹⁷⁶ This may result from fewer employer workplace violations. There is also the possibility, however, that employees are simply reluctant to assert their labor rights or that their complaints are underenforced.¹⁷⁷ All workers, both authorized and unauthorized, should be interested in holding employer-violators accountable for their illegal and unfair conduct. Applying an across-the-board remedy like back pay encourages employees to assert complaints and also forces employer-violators to pay for their illegal actions—thus deterring any further violations.¹⁷⁸

Incentivizing unauthorized employees to bring forward complaints under the NLRA also achieves the prioritization goals of immigration policy in that ICE can focus its resources on employers who have knowingly exploited the rights of its unauthorized employees.¹⁷⁹ Employers who treat their employees fairly and according to the law, despite their immigration status, will not be held accountable for IRCA violations through the NLRB process. While such employers will still be subject to discipline if discovered through an ICE workplace raid or a verification process audit, they can avoid ICE by engaging in fair labor practices with respect to all employees. However, if an

¹⁷⁵ See, e.g., OM 11-62, *supra* note 130, at 1; Meissner Memo, *supra* note 144.

¹⁷⁶ See *Charges and Complaints*, NLRB, <http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints> (last visited Oct. 5, 2015).

¹⁷⁷ See Estlund, *supra* note 62, at 1554.

¹⁷⁸ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 153–54 (2002) (Breyer, J., dissenting).

¹⁷⁹ See Julia Preston, *A Crackdown on Illegal Workers*, N.Y. TIMES (May 29, 2011), <http://www.nytimes.com/2011/05/30/us/politics/30raid.html?page=wanted=all>.

employer repeatedly exploits the rights of unauthorized workers, federal immigration agencies can benefit from more employee-victims bringing meritorious complaints to the NLRB, and then working with victims and the NLRB to target the repeat-offenders. This would further the IRCA's goals of penalizing employer-violators.¹⁸⁰

B. Humanitarian Values

The NLRA promotes an unimpaired flow of commerce by eliminating sources of "industrial strife," encouraging alternative means of labor disputes, and ensuring "equality of bargaining power among employers and employees."¹⁸¹ While the statute also mentions that the problem of unequal bargaining power results from the denial of employees to possess freedom of association and liberty, there is no stated motive to protect human or fundamental rights of workers in the text of the statute.¹⁸² However, the international community has generally recognized labor rights as fundamental human rights,¹⁸³ and the U.S. executive branch regularly exercises its authority for humanitarian purposes in both the immigration and labor context through prosecutorial discretion.¹⁸⁴

It would be contrary to American principles of equality and fairness to deprive some workers of the full protection of the NLRA based on their immigration status. Indeed, unauthorized immigrants are still members of U.S. society "who make valuable contributions to not only the economy . . . but also to the cultural fabric" of our country.¹⁸⁵ The overlap of immigration law and

¹⁸⁰ See H.R. REP. NO. 99-682, pt. 1, at 45, 58–59 (1986), as reprinted in 1986 U.S.C.C.A.N. 5653, 5662–63.

¹⁸¹ The National Labor Relations (Wagner) Act of 1935, 29 U.S.C. § 151 (2012).

¹⁸² See *id.*

¹⁸³ See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 75 (Dec. 10, 1948).

¹⁸⁴ Wadhia, *supra* note 144, at 245 (noting that one of the two theories behind the executive power of prosecutorial discretion is humanitarian).

¹⁸⁵ Elaine Dewhurst, *Models of Protection of the Right of Irregular Immigrants to Back Pay: The Impact of the Interconnection Between*

labor law should not only produce negative or inconsistent results, as it has in the wake of *Hoffman Plastic Compounds*. Instead, the United States would benefit from using the same humanitarian policy behind prosecutorial discretion to extend equal rights to all of its workers, regardless of their immigration status, who have been subjected to unfair labor practices.

*C. Upholding American Labor Values and Embracing
Citizen-Like Qualities of Unauthorized Immigrants*

Unauthorized immigrants need to receive full protection under the NLRA in order to promote the distinct rights that the statute seeks to protect. Unlike the FLSA, where employees may be compensated for unpaid wages or overtime for their individual work performed,¹⁸⁶ the NLRA encourages union activity and collective bargaining to achieve fair working conditions *for all* workers.¹⁸⁷ Under the FLSA, an employee may realize that he has been individually wronged by his employer, sue for compensation, and incidentally deter his employer from wronging other employees. Conversely, an employee who has been retaliated against by her employer for her protected concerted activity files a complaint under the NLRA primarily to enjoin her employer from continuing to engage in harmful labor practices. The recovery of back pay is only incidental. The employee who asserts a complaint under the NLRA, regardless of immigration status, does not come forward for the wholly self-interested reason of obtaining damages, but rather comes forward to combat the unfair labor practices that affect all employees in similar positions. Indeed, every U.S. employee, authorized or unauthorized, stands to benefit from his coworker standing up to an unlawful employer.

The unauthorized worker who is motivated by factors other than back pay presents characteristics and values that deserve special attention. While the remedy of back pay undoubtedly

Immigration Law and Labor Law, 35 COMP. LAB. L. & POL'Y J. 217, 240 (2014).

¹⁸⁶ *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP'T LAB., <http://www.dol.gov/whd/regs/compliance/hrg.htm> (last visited Oct. 5, 2015).

¹⁸⁷ See Lee, *supra* note 170, at 242–43.

increases the incentive for employees to assert when they have been retaliated against for protected activity, the underlying motive is solidarity.¹⁸⁸ Stephen Lee, author of *Screening for Solidarity*, published in the University of Chicago Law Review, recognizes this unique solidarity principle behind the NLRA.¹⁸⁹ Lee has suggested that unauthorized immigrants who assert their labor rights in solidarity with authorized U.S. workers demonstrate a desirable quality that merits immigration benefits.¹⁹⁰ Lee seems to limit this model to unauthorized immigrants who have formed social and economic bonds with their authorized coworkers through “cross-status solidarity.”¹⁹¹ However, even unauthorized immigrants who assert labor complaints under the NLRA in solidarity with other unauthorized immigrants demonstrate qualities that merit priority protection from removal. Unauthorized immigrants who come forward in solidarity with other unauthorized workers display qualities such as courage, a sense of moral duty, and a commitment to fairness in the workplace that deserve at least some temporary immigration relief.

III. TWO APPROACHES TO INCENTIVIZING UNAUTHORIZED IMMIGRANTS TO ASSERT THEIR RIGHTS UNDER THE NLRA

To achieve these three goals, Congress must provide a remedy attractive enough to incentivize unauthorized employees to come forward with their complaints and endure the long NLRB process. If not for the rules set forth by *Hoffman Plastic Compounds* and its successors, the remedy of back pay existing under the NLRA could serve to entice unauthorized employees to come forward. Many have argued, however, that back pay’s effectiveness as a labor

¹⁸⁸ See *id.* at 243 (“[Solidarity] is an ethical commitment to forgo individual gain in the interests of a larger set of community interests.”).

¹⁸⁹ *Id.* (“Many workplace laws are grounded in a vision of collective rights and at the heart of this vision is the principle of solidarity.”).

¹⁹⁰ *Id.* at 227.

¹⁹¹ *Id.* at 249–50. Lee’s emphasis on social bonds relates to the current model of deciding who is eligible to immigrate to or remain in the United States. *Id.*

regulating remedy has diminished over the years.¹⁹² For unauthorized workers who may be vulnerable to employer threats, unaware of their labor rights, or fearful of deportation, back pay alone may not sufficiently incentivize them to exercise their labor rights. Therefore, Congress and the President must work together to create a multifaceted incentive for unauthorized workers that encourages them to stand up against employer-violators and enjoy the full protection of the NLRA.

A. Congressional Action

Congressional inefficiency—exemplified in the failure of Senate Bill S. 744—makes the prospect of legislative action seem unlikely. While S. 744 would have been instrumental in incentivizing unauthorized immigrants to assert their labor rights under the NLRA, a “piecemeal” approach, as asserted by some politicians, may be necessary. The breadth and comprehensiveness of S. 744, which some may perceive as a necessary strength in order to address many outstanding problems with immigration law, may also be perceived as overbroad and unfocused. Republicans and Democrats should work together to amend the IRCA to include a provision similar to that written in S. 744¹⁹³ that clarifies that back pay *is* an available remedy to *all* employees despite irregular immigration status. By reestablishing back pay as a remedy available to all workers, unauthorized immigrants would be placed on an even playing field. This would further incentivize them to bring their NLRA complaints forward.

B. Executive Action

Providing an opportunity for those who assert their labor rights to affirmatively seek deferred action would also incentivize unauthorized immigrants to come forward with NLRA complaints. Granting deferred action to unauthorized immigrants at the

¹⁹² See Estlund, *supra* note 62, at 1537, 1553 n.115 (noting how back pay can seem like “a minor cost of doing business to an employer committed to avoiding unionization” and referring to the “paltriness of the threat [it] pose[s]”).

¹⁹³ Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Congress, § 3101(a)(8) (2013).

compliance stage is something that the General Counsel has the authority to explore with immigration agencies in certain circumstances.¹⁹⁴

Without having some degree of certainty that she will be safe from deportation by the end of the NLRB complaint process, however, an unauthorized immigrant is unlikely to assert her complaint.¹⁹⁵ First, even a successful complaint may only result in a cease and desist order and a minimal fine.¹⁹⁶ This may only be beneficial if the undocumented worker wishes to protect her former colleagues, or if she places great value on the notion of workplace justice. Second, there is no guarantee that she will be granted deferred action, as the immigration status question is only addressed at the final stage in NLRB proceedings, during which time the decision regarding a grant of deferred action is left up to the discretion of the Board. With the process currently in place, an unauthorized immigrant fired in response to participating in protected concerted activity, would likely move on to find another job. Since immigrants (both authorized and unauthorized) are more likely to be found working in industries that have poor working conditions,¹⁹⁷ the cycle of working for abusive employers without an incentive to assert one's labor rights could continue indefinitely. This reality frustrates the Congressional purposes that *Hoffman Plastic Compounds* and its progeny have purported to promote in stripping back pay from the NLRB's "remedial arsenal."¹⁹⁸

Similar to DACA and DAPA, the current administration should develop a process by which an unauthorized immigrant, upon filing a charge under the NLRA, may also apply for deferred action. This process would provide a means of affirmative, temporary relief, without the uncertainty of prosecutorial discretion

¹⁹⁴ OM 11-62, *supra* note 130.

¹⁹⁵ See Lee, *supra* note 170, at 230.

¹⁹⁶ See 29 U.S.C. § 160(c).

¹⁹⁷ MEISSNER, *supra* note 27, at 84 (noting how immigrants of all legal statuses are "highly concentrated in certain industries that have traditionally experiences substantial labor standards violations"); BERNHARDT, *supra* note 28, at 23 (indicating that immigrants are most likely to endure workplace violations amongst workers in New York City).

¹⁹⁸ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 153–54 (2002) (Breyer, J. dissenting).

at the compliance stage of NLRB proceedings. To be eligible for such relief, an unauthorized immigrant should meet most of the general guidelines set out by DACA and DAPA, such as the absence of past felony convictions and not being considered an enforcement priority for removal.¹⁹⁹ Instead of meeting the DACA or DAPA criteria, the proposed requirement would be the concurrent filing of a complaint against an employer under the NLRA. The establishment of this standard would demonstrate that the applicant has significant ties to his or her fellow workers and to American labor values and thus deserves special consideration as an individual contributing to the betterment of the American workplace. Such a vehicle would be consistent with the prioritizing principles laid out in the DHS's most recent memorandum,²⁰⁰ but would add another layer to American immigration enforcement.

CONCLUSION

For over ten years, the government has failed to address the uncertainty and injustice created by *Hoffman Plastic Compounds* and has yet to create a solution that reconciles federal immigration law with federal labor law. Incentivizing unauthorized immigrants to assert their labor rights under the NLRA is necessary to deter employer-violators from violating federal labor laws, to provide full protection to all workers from human rights abuse, and to reward unauthorized workers for their citizen-like qualities and demonstrated commitment to fairness and justice for all in the American labor force. The ideal incentive to entice unauthorized immigrant victims of NLRA violations would include both legislative and executive action. A legislative approach to extending the back pay remedy to unauthorized immigrants would provide the NLRB with a consistently effective enforcement mechanism against employer-violators and fulfill its promise of

¹⁹⁹ See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, *supra* note 158; *YOU MAY BE ABLE TO REQUEST DAPA*, *supra* note 163.

²⁰⁰ Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants, 3–4 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

labor rights protection to *all* employees, regardless of immigration status. Providing back pay to individuals who have been the objects of employer retaliation would incentivize those individuals to take action against their employers in order to (1) deter unfair and illegal employer behavior that effectively impacts all employees and (2) receive compensation for wages lost as a result of an employer's violation. An executive action creating a process in which deferred action could be granted to unauthorized immigrant complainants in the first stages of the NLRB process would further incentivize unauthorized immigrants to come forward and further the purposes of the NLRA. While a bipartisan, dual-branched effort may seem like an impossible ideal in the current political climate, it is an ideal that the government should strive for in order to ensure the vitality of American labor values and equal protection for all workers.